U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. 3000
Washington, DC 20529

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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: VERMONT SERVICE CENTER Date: MAR 30 2007

EAC 03 248 54196

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Vermont Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks classification pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as a member of the professions holding an advanced degree. The petitioner seeks employment as a research assistant professor at the National Oceanic and Atmospheric Administration-Cooperative Remote Sensing Science and Technology Center (NOAA-CREST) at the City University of New York (CUNY). The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director found that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but has not established that an exemption from the requirement of a job offer would be in the national interest of the United States.

Although the record contains no notification of counsel's withdrawal, there is no indication that counsel participated in the preparation or filing of the appeal. Counsel is located in Arizona; the appeal was postmarked in New York. On appeal, the petitioner indicates that further evidence will be forthcoming within 30 days. To date, a year and a half after the filing of the appeal, the record contains no further substantive submission from the petitioner. We therefore consider the record to be complete as it now stands.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer.
> >
> > > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion

of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989). Supplementary information to regulations implementing the Immigration Act of 1990 (IMMACT), published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now Citizenship and Immigration Services] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation, 22 I&N Dec. 215 (Comm. 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. Next, it must be shown that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications.

It must be noted that, while the national interest waiver hinges on prospective national benefit, it clearly must be established that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The inclusion of the term "prospective" is used here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

We also note that the regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

We note that the petitioner had previously filed another petition on her own behalf on November 16, 2001, with receipt number WAC 02 044 51297, when the petitioner was a postdoctoral research scientist at the University of Arizona. The same attorney of record was involved in both petitions. The Director, California Service Center, denied the first petition on September 26, 2002. In filing the present petition in 2003, counsel indicated that the petitioner "chose not to appeal" that denial. This is not true. The petitioner appealed that decision on October 24, 2002, with the participation of counsel. That appeal was still pending when, in September 2003, counsel incorrectly stated that the petitioner "chose not to appeal." The AAO dismissed the appeal on January 22, 2004. There having been no further action in that proceeding, the petition from 2001 is administratively closed.

In a statement accompanying her second petition, the petitioner describes her work:

> I have about 9 years of progressive experience in the area of hydrology, hydroclimatology, satellite remote sensing, and applications of remote sensing, image processing, and artificial neural networks for hydrology. . . .
>
> ***My responsibilities at this position (an assistant professor)***
>
> - Academic aspects; teaching some remote sensing and image processing courses . . . and participating in training programs . . . in both undergraduate and graduate levels.
> - Research aspects; the main aspect of my researches is applying high-resolution remotely sensed information . . . for hydrological applications, particularly retrieval and improving precipitation (rainfall and snowfall) estimates. Improving spatial and temporal resolutions . . . of satellite-derived precipitation estimates. . . . One error is cloud-top relief spatial displacement, that can be adjusted by employing my developed algorithm, useful for increasing the accuracy and quality of the satellite and VIS/IR images. In addition, developing an algorithm to merge rainfall derived from multiple sources . . . to improve accuracy, resolution and time-space limitation of rainfall estimates. . . .
>
> My research contribution is of national scope and falls under NOAA-CREST efforts in lieu of the NWS development of the Advanced Hydrologic Prediction Services (AHPS) because flood forecasting and drought predicting are important applications of high resolution precipitation estimates. My current research focus is to improve hydrologic forecasting.

Although the petitioner's initial statement deals only with her work at NOAA-CREST, much of the material submitted with the petition concerns her earlier work at the University of Arizona. A substantial fraction of the petitioner's supporting documents and letters were, in fact, originally submitted in support of her earlier petition.

Letters regarding the petitioner's earlier work at the University of Arizona describe ongoing projects that had not yet yielded definitive results. For example, University of Arizona alumnus [redacted], a research hydraulic engineer at the Agricultural Research Service of the United States Department of Agriculture, states that the petitioner has "a unique approach" that "is anticipated to develop a satellite-based approach that can improve accuracy of snow-pack estimates at high resolutions." University of Arizona [redacted] states "the successful completion of [the petitioner's] current and planned research efforts . . . will provide [a] much needed contribution to the water resources management community in the entire western US. . . . When completed, her research efforts are expected to yield a new capability of real flow updating of snow cover under clouds."

Overall, the letters regarding the beneficiary's work at the University of Arizona are, for the most part, from individuals at or closely connected with that university, stressing the importance of the petitioner's goals. There is no indication that the petitioner completed her "planned research efforts" at the University of Arizona before she left that institution in May 2003. As late as March 2003, University of Arizona [redacted]

[redacted]n, Director of the National Science Foundation's Science and Technology Center for Sustainability of Semi-Arid Hydrology and Riparian Areas (SAHRA), discusses the petitioner's work in terms of what "we intend to" accomplish, discussing how her work "will be used." In this March 2003 letter, [redacted] does not acknowledge, or seem to be aware of, the petitioner's then-imminent departure for NOAA-CREST at CUNY. Indeed, [redacted]n states: "without her involvement, we will have a setback in this important project." The petitioner's subsequent work at CUNY has been along similar lines, but there is no evidence that her work at both institutions has been under the aegis of the same project.

In a separate letter, dated October 15, 2001, [redacted] states that the petitioner "has served on more than one occasion as a reviewer of articles and proposals . . . and she has also reviewed a book." We note here that Prof. Sorooshian does not discuss how the petitioner came to be selected to act as a reviewer. Prof. Sorooshian merely asserts that the petitioner acted as a peer reviewer and "has done an excellent job in her reviews."

[redacted], Deputy Director of the National Center for Atmospheric Research, states that he has "not worked directly with" the petitioner, although we note that he is a member of SAHRA's Executive Committee and an Adjunct Professor at the University of Arizona. [redacted] states that the petitioner is "one of the key members of . . . SAHRA's team." Within weeks of the date of this letter, the petitioner had left the SAHRA project.

Regarding the petitioner's work at NOAA-CREST, CUNY Professor [redacted] director of NOAA-CREST, states:

> [The petitioner] will be responsible for a key component of her research. Her expected contributions include improving high spatial (up to 4 km) and temporal (hourly) resolution of remotely sensed precipitation estimates, and developing an approach to blend high resolution satellite-based and radar rainfall and fill the gaps created by poor radar coverage over mountainous regions.

[redacted] adds that the petitioner "is also expected to lead" efforts "to develop snowfall estimates from satellite observations," and that her work "will include the participation in several training programs conducted at NOAA-CREST."

[redacted] discusses the petitioner's work in the future tense because the professor wrote the letter in April 2003, before the petitioner had actually begun working at NOAA-CREST. (The petitioner's résumé indicates that the petitioner began working there in May 2003.) [redacted] says little about the petitioner's past work, except to state that it shows the petitioner's "recognized expertise" in areas relating to her future work at NOAA-CREST.

The letters describe a project to which the petitioner has ceased to contribute, and witnesses' expectations regarding another project that the petitioner, at the time, had yet to join. The letters offer no objective indication that the petitioner's contributions to her field have stood out from those of her colleagues. The importance of a project does not necessarily qualify its participants for the national interest waiver.

The petitioner submits copies of published articles, manuscripts and abstracts of presentations. This evidence, on its face, shows that the petitioner has disseminated her findings, but it does not demonstrate the relative impact of those findings compared with the work of others in the field. One means of gauging the impact and influence of a given article is the rate at which other researchers cite that article. An article with heavy independent citation tends to be better known and more influential than an article with few or no such citations. The petitioner states that her petition includes evidence of citations, but it does not. The section labeled "Citations" is, in fact, a list of articles by individuals who share the petitioner's surname. Of the eight articles listed, the petitioner wrote only one. There is no indication that the beneficiary's article has been independently cited. The inclusion of the petitioner's article in a database such as ISI Web of Science is not, itself, an independent citation.

On June 14, 2005, the director issued a notice of intent to deny, stating that the petitioner had falsely claimed not to have appealed the denial of her earlier petition, even though the same attorney was involved in both proceedings and therefore the petitioner "should be aware of the appeal." The director also stated that the petitioner's duties at CUNY appear to be more or less routine for a faculty member. Furthermore, the director observed that the petitioner had resubmitted many letters from her prior petition, even though those materials were demonstrably insufficient to establish the petitioner's eligibility when submitted previously.

In response, counsel states that the assertion that the petitioner "chose not to appeal" the earlier denial was "an error inadvertently typed," rather than a deceptive attempt to conceal the earlier appeal. This explanation seems plausible. As counsel observes, it would have served no apparent purpose for the petitioner to acknowledge the denial of the earlier petition, but conceal the existence of the appeal. Counsel then states:

> [N]ot every academic instructor is necessarily given the job of reviewing academic publications by their peers. This is always relegated to those who have achieved a particular competency above the average scientist. Please note that [redacted] made it clear by his letter of support. Furthermore, the fact that [the petitioner] was asked to review a text book demonstrates that she is particularly valued in her field.

The petitioner has not persuasively shown that participation in peer review is *prima facie* evidence of her standing in the field. The assertions of counsel do not constitute evidence. *Matter of Laureano*, 19 I&N Dec. 1, 2, 4 (BIA 1983); *Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The 2001 letter from [redacted] acknowledges the petitioner's peer review work, but in no way indicates that such work derives from her reputation in the field. Thus, in the same letter, counsel apologizes for erroneously claiming that the petitioner did not appeal a prior denial, and then goes on to make erroneous claims regarding the contents of [redacted] letter.

The remainder of the petitioner's response to the notice consists of the petitioner's updated résumé and abstracts regarding her latest projects. These materials indicate that the petitioner remains active in the field but they do not facially establish eligibility for special immigration benefits such as the waiver.

The director denied the petition on August 16, 2005, stating that the petitioner had not satisfactorily addressed the director's prior statement that the petitioner's new petition essentially repeats her earlier, denied petition.

On appeal, the petitioner argues that the projects she has pursued have important implications ranging from storm warnings to the availability of fresh water. The director, in denying the petition, did not dispute the intrinsic merit or national scope of these types of projects. Nevertheless, participation in a worthwhile project is not, by itself, grounds for granting the waiver. Many scientists are engaged in work of similar importance, but Congress created no blanket waiver for scientific researchers when it made alien professionals with advanced degrees subject to the job offer/labor certification requirement.

The petitioner contends that she "is an exception by being a profession with a long time experience in the various combination of multi-scientific areas" (*sic*). We note that length of experience can be one element in a claim of exceptional ability, although additional evidence is necessary. *See* 8 C.F.R. § 204.5(k)(3)(ii)(B). Section 203(b)(2)(A) of the Act specifically provides that aliens of exceptional ability are generally subject to the job offer requirement; they do not presumptively qualify for the waiver. Thus, the assertion that the petitioner's length of experience qualifies her for the waiver is not consistent with the statute and regulations.

The petitioner repeats the assertion that participation in peer review "can be considered as an evidence for a level of competition for being an excellent between the other students in the same field, if not an exception" (*sic*). Once again, this is an unsupported assertion. Even if we accept counsel's prior assertion that peer review requires "competency above the average scientist," the threshold for the waiver is not simply that one is "above average" in one's field. We reiterate here that exceptional ability is not sufficient, and it would therefore be contrary to the intent of Congress to approve a waiver simply because a given alien shows "competency above the average scientist."

The remainder of the petitioner's statement on appeal consists of vague descriptions of materials that the petitioner claims she will submit once she has obtained them. As we have already noted, the record contains no later submissions from the petitioner or her attorney.

As is clear from a plain reading of the statute, it was not the intent of Congress that every person qualified to engage in a profession in the United States should be exempt from the requirement of a job offer based on national interest. Likewise, it does not appear to have been the intent of Congress to grant national interest waivers on the basis of the overall importance of a given profession, rather than on the merits of the individual alien. On the basis of the evidence submitted, the petitioner has not established that a waiver of the requirement of an approved labor certification will be in the national interest of the United States.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.